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No. 97-1744

In the Supreme Court of the United States

OCTOBER TERM, 1997

JULIA A. CHRISTIANS, PETITIONER

v.

CRYSTAL EVANGELICAL FREE CHURCH

and

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The United States intervened in this action solely to defend the constitutionality of the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.* The United States therefore addresses only the following issue:

Whether the Religious Freedom Restoration Act is constitutional as applied to federal bankruptcy law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A28) is reported at 141 F.3d 854. The district court's opinion (Pet. App. A72-A103) is reported 152 B.R. 939. The decision of the Bankruptcy Court (Pet. App. A104-A128) is reported at 148 B.R. 886. The prior decision of the court of appeals (Pet. App. A30-A67) is reported at 82 F.3d 1407, and the order denying rehearing of that decision (Pet. App. A68-A71) is reported at 89 F.3d 494. This Court's order vacating and remanding to the court of appeals (Pet. App. A29) is reported at 117 S. Ct. 2502.

JURISDICTION

The court of appeals entered its judgment on April 13, 1998. The petition for a writ of certiorari was filed on April 24, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. At the time this action was commenced, the Bankruptcy Code authorized the trustee for a bankrupt estate to "avoid any transfer of an interest of the debtor" that was made within one year of the filing of the bankruptcy petition if, among other things, the debtor "received less than a reasonably equivalent value in exchange for such transfer" and the debtor was insolvent at the time. 11 U.S.C. 548(a)(2). "Value" is defined as "property, or satisfaction or securing of a present or antecedent debt of the debtor." 11 U.S.C. 548(d)(2)(A).

On June 19, 1998, the Religious Liberty and Charitable Donation Protection Act of 1998 (Donation Act), Pub. L. No. 105-183, 112 Stat. 517, became law.[1] The Donation Act excludes certain charitable and religious donations from the trustee's power to void transfers under 11 U.S.C. 548. As relevant here, the Donation Act amends 11 U.S.C. 548(a) to provide that:

> A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B)[2] in any case in which—

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[1] The text of the Donation Act is reproduced in an addendum to the Church's Brief in Opposition.

[2] The Donation Act also renumbers the preceding provisions of Section 548(a). Subsection (1)(B) refers to the trustee's authority to void a transfer that was not made for reasonably

> (A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or
>
> (B) the contribution made by the debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.

§ 3(a), 112 Stat. 517-518. The Donation Act defines "charitable contribution" as a contribution covered by Section 170(c) of the Internal Revenue Code, 26 U.S.C. 501(c) (1986), if the contribution is made by a natural person and consists of a financial instrument or cash. § 2, 112 Stat. 517. A "qualified religious or charitable entity or organization" also is defined by reference to Section 170 of the Internal Revenue Code. *Ibid.*

The Act applies "to any case brought under an applicable provision of title 11, United States Code, that is pending or commenced on or after the date of enactment of this Act." § 5, 112 Stat. 518-519.

b. The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless "it demonstrates that application of the burden to the person * * * (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42

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equivalent value (which was previously codified as 11 U.S.C. 548(a)(2)(A)).

U.S.C. 2000bb-1. The "exercise of religion" means "the exercise of religion under the First Amendment to the Constitution." 42 U.S.C. 2000bb-2(4).

A person whose rights under RFRA have been violated "may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. 2000bb-1(c). RFRA identifies the "government[s]" subject to its terms as including any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." 42 U.S.C. 2000bb-2(1). RFRA also applies to all territories and possessions of the United States. 42 U.S.C. 2000bb-2(2). RFRA's coverage embraces "all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after" RFRA's enactment. 42 U.S.C. 2000bb-3(a).[3]

Congress enacted RFRA following this Court's decision in *Employment Div., Dep't of Human Resources* v. *Smith*, 494 U.S. 872 (1990). In enacting RFRA, Congress expressed concern about the effect of the *Smith* decision on the exercise of religion and, in particular, on minority religions. 42 U.S.C. 2000bb(a). Congress, accordingly, passed RFRA to establish, as a matter of statutory right, "the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases

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[3] All federal laws enacted after RFRA's passage are subject to its terms "unless such law explicitly excludes such application." 42 U.S.C. 2000bb-3(b). The Donation Act contains a rule of construction, which provides that "[n]othing in the amendments made by this Act is intended to limit the applicability of the Religious Freedom Restoration Act of 1993." § 6, 112 Stat. 519.

where free exercise of religion is substantially burdened." 42 U.S.C. 2000bb(b)(1).

In passing RFRA, Congress relied upon its authority under Section 5 of the Fourteenth Amendment to make RFRA applicable to the States. With respect to federal law, Congress invoked its substantive powers under Article I, Section 8 of the Constitution in conjunction with its authority under the Necessary and Proper Clause, U.S. Const., Art. I, § 8, Cl. 18. S. Rep. No. 111, 103d Cong., 1st Sess. 13-14 (1993); H.R. Rep. No. 88, 103d Cong., 1st Sess. 9 (1993).

2. Bruce and Nancy Young (debtors) filed a Chapter 7 bankruptcy petition in 1992. Pet. App. A3. In the year preceding that filing, the debtors contributed $13,450 in tithes to the Crystal Evangelical Free Church. *Id.* at A135. The Youngs were insolvent at the time they made those contributions. As a result, petitioner, who is the trustee appointed in the debtor's bankruptcy case, initiated the present proceeding against the Church to recover the contributions as avoidable transfers under 11 U.S.C. 548(a)(2)(A). Pet. App. A3.

The Bankruptcy Court granted petitioner's motion for summary judgment, holding that the contributions were voidable under Section 548. Pet. App. A104-A128. The District Court affirmed. *Id.* at A72-A103.

The Church appealed. During the pendency of that appeal, Congress enacted RFRA. The court of appeals subsequently held that the debtor's tithes were avoidable transfers within the meaning of Section 548, but that RFRA precluded petitioner from seeking to recover those transfers from the Church. Pet. App. A30-A60. The parties did not raise, and the court of

appeals did not address, the constitutionality of RFRA. *Id.* at A51.[4]

3. In *City of Boerne* v. *Flores*, 117 S. Ct. 2157 (1997), this Court held that Congress lacked the authority under Section 5 of the Fourteenth Amendment to impose RFRA upon state and local governments. *Id.* at 2162-2172. The Court explained that Congress's power under Section 5 is "remedial" and "preventive," extending only to enforcing the constitutional protections embodied in the Fourteenth Amendment, as defined by this Court. *Id.* at 2164, 2169. Congress cannot employ its Section 5 enforcement powers to "decree the substance of the Fourteenth Amendment's restrictions on the States." *Id.* at 2164. The Court noted that "[t]he design of the Fourteenth Amendment has proved significant * * * in maintaining the traditional separation of powers," because Congress's enforcement powers are limited by the Court's predicative authority to interpret the scope of the constitutional rights that Congress may protect. *Id.* at 2166.

The Court concluded that RFRA is not "remedial, preventive legislation," because its provisions "far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted" by the Court. *Flores*, 117 S. Ct. at 2170, 2171. Accordingly, the Court concluded that RFRA would impermissibly "intru[de] into the States' traditional prerogatives and general authority to regulate for the

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[4] The United States intervened in the court of appeals to defend against the Church's arguments that Section 548 of the Bankruptcy Code is unconstitutional. The United States withdrew that intervention shortly before oral argument in the case.

health and welfare of their citizens," *id.* at 2171, and thus could not "be considered enforcement legislation under § 5 of the Fourteenth Amendment," *id.* at 2168.

Petitioner filed a petition for a writ of certiorari. This Court vacated the judgment of the court of appeals and remanded for further consideration in light of *Flores*. Pet. App. A29.

4. On remand, the United States intervened to defend the constitutionality of RFRA as applied to the federal government and federal law. The court of appeals ruled that RFRA is constitutional as applied to federal bankruptcy law. The court noted that "the *Flores* Court did not address whether Congress could, pursuant to its Article I authority, constitutionally impose RFRA on *federal* law." Pet. App. A8. The court concluded that RFRA falls within Congress's broad, substantive power under Article I of the Constitution—in this case the Bankruptcy Clause as augmented by the Necessary and Proper Clause. *Id.* at A12-A14.[5]

The court of appeals further held that RFRA does not violate the separation of powers. The court noted that, while Congress may not amend the Supreme Court's authoritative interpretation of the Constitution, Congress may offer additional protection in the federal sphere to constitutional rights as long as Congress legislates pursuant to its recognized powers under Article I. Pet. App. A10-A11. Finally, the court of appeals held that RFRA does not violate

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[5] The court of appeals held that the portion of RFRA applicable to federal law is severable from the portion applicable to the States that was invalidated in *Flores*. Pet. App. A9. Petitioner does not seek this Court's review of that aspect of the court of appeals' decision.

the Establishment Clause of the First Amendment. *Id.* at A17-A19.

ARGUMENT

Petitioner seeks this Court's review of whether RFRA is constitutional as applied to federal bankruptcy law. Pet. 6-26. Because intervening legislation separately supports the judgment of the court of appeals and eliminates the basis for petitioner's recoupment action, the question presented is of no continuing relevance to this case or any analogous case. Furthermore, the decision of the court of appeals is correct and does not conflict with the established law of any other circuit or of this Court. Accordingly, this Court's review is not warranted.

1. Congress's recent enactment of the Donation Act eliminates the basis for petitioner's action and renders the question of RFRA's application to this case of no further relevance. This Court "reviews judgments, not opinions." *Bowen* v. *American Hosp. Ass'n*, 476 U.S. 610, 626 n.11 (1986) (opinion of Stevens, J.). There can be no substantial doubt that the judgment of the court of appeals in the present case is correct and, indeed, compelled by the Donation Act.

The Donation Act forbids petitioner from recovering under Section 548 of the Bankruptcy Code any religious or charitable contribution that does not exceed fifteen percent of the debtors' gross annual income or that is consistent with the debtors' established practice in making religious or charitable contributions. § 3(a)(2), 112 Stat. 517-518. The undisputed facts of this case (see Pet. App. A3, A135-A137) leave no doubt that the debtors' donations satisfy that statutory standard. The debtors gave ten percent of

their gross income to the Church, which is well within the fifteen percent limit set by subsection (a). *Id.* at A3, A32, A105, A135. In addition, the debtors' payment of the tithes was consistent with their established pre-bankruptcy donation practice. *Id.* at A3, A32, A105. And there can be no serious argument that the Church is not a "qualified religious or charitable entity or organization," within the meaning of the Donation Act, § 3(a), 112 Stat. 517-518. To the contrary, arguments earlier in the litigation over whether the donations could be recovered under the former Section 548 presumed the Church's qualifying status under the Internal Revenue Code. See Pet. App. A86-A87, A123-A124. Finally, the Donation Act plainly applies to all pending cases. § 5, 112 Stat. 518-519.

In short, the Donation Act eliminates the basis for petitioner's recoupment action and the Church's need to invoke RFRA. A decision on the constitutionality of RFRA would have no effect on these parties or on the outcome of this (or any analogous) litigation.

Furthermore, "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [this Court] ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable." *New York City Transit Auth.* v. *Beazer*, 440 U.S. 568, 582 (1979); see also *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). To that end, "[b]efore deciding the constitutional question" presented by petitioner, it would be "incumbent on [this Court] to consider whether the statutory grounds might be dispositive." *Beazer*, 440 U.S. at 582. Because the terms of the Donation Act are clear and unquestionably implicated by the pre-

sent case, it is extremely unlikely that granting the petition would result in this Court's consideration of the constitutional question presented.

2. Even were the Donation Act not dispositive of the present litigation, the decision of the court of appeals would not merit this Court's review.

a. The decision of the court of appeals does not conflict with the established law of any other circuit. To the contrary, the court's ruling is the first post-*Flores* appellate decision to address and specifically decide the validity of RFRA as it applies to federal law.[6] The only pre-*Flores* court of appeals decision to address RFRA's validity in the federal sphere, moreover, also ruled that RFRA is a valid exercise of Congress's power under Article I, and rejected the contention that RFRA violates the Establishment Clause and the separation of powers. *EEOC* v. *Catholic Univ.*, 83 F.3d 455, 469-470 (D.C. Cir. 1996) ("We doubt that [a party] would argue that Congress

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[6] Since *Flores*, two unpublished memoranda dispositions have stated broadly, in cases involving the federal government, that *Flores* rendered RFRA unconstitutional. See *United States* v. *Dee*, 122 F.3d 1074 (9th Cir. 1997) (Table), petition for writ of cert. pending, No. 97-8677 (filed Apr. 13, 1998); *Patel* v. *United States*, 132 F.3d 43 (10th Cir. 1997) (Table). Those decisions do not create a genuine inter-circuit conflict because the unpublished rulings have no precedential force, are not law of the circuit, and provide no indication of how the Ninth or Tenth Circuit will rule when squarely presented with the question of RFRA's continued applicability to the federal government. See 9th Cir. R. 36-2, 36-3; 10th Cir. R. 36.3. At least two other courts of appeals have noted, but reserved, the question. *Alamo* v. *Clay*, 137 F.3d 1366, 1368 (D.C. Cir. 1998) (assuming RFRA's continued application to the federal government); *United States* v. *Grant*, 117 F.3d 788, 792 n.6 (5th Cir. 1997).

lacks at least the facial authority to determine against whom, and under what circumstances, Title VII and other laws will be enforced.").

All of the other court of appeals' decisions cited by petitioner (Pet. 16-17 n.3) either pre-date *Flores* or involve RFRA's applicability to state law.[7] None of those cases, therefore, remotely conflicts with the ruling of the court of appeals in this case. Petitioner's additional citation of a few conflicting bankruptcy court decisions (*ibid.*) does not necessitate this Court's review because the recent enactment of the Donation Act resolves the substance of the conflict and ensures that it will not arise again. In any event, uniformity of bankruptcy court decisions should be policed by the district courts and courts of appeals in the first instance.[8]

b. The ruling of the court of appeals is also consistent with this Court's decision in *Flores*. *Flores* involved the application of RFRA to a local ordinance. As a result, the sole issue before the Court was the validity of "the most far reaching and substantial of RFRA's provisions, those which impose its requirements on the States." *Flores*, 117 S. Ct. at 2162.

Central to the Court's holding was the determination that Congress's power under Section 5 of the

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[7] See *Shabazz* v. *Parsons*, 127 F.3d 1246 (10th Cir. 1997) (addressing RFRA's applicability to state law); *Muhammad* v. *City of New York Dep't of Corrections*, 126 F.3d 119 (2d Cir. 1997) (same); *Anderson* v. *Angelone*, 123 F.3d 1197 (9th Cir. 1997) (same); *Montano* v. *Hedgepeth*, 120 F.3d 844 (8th Cir. 1997) (same); *Sasnett* v. *Sullivan*, 91 F.3d 1018 (7th Cir. 1996) (pre-*Flores* decision upholding RFRA's constitutionality as applied to the States), vacated, 117 S. Ct. 2502 (1997).

[8] Petitioner's references to disputes among legal scholars (Pet. 17-18 n.4, 26 n.7), provide no basis for this Court's review.

Fourteenth Amendment may be exercised only to remedy or prevent a violation of the substance of that Amendment, as defined by this Court. See 117 S. Ct. at 2166-2167. It was in that narrow context that the separation of powers was addressed. *Id.* at 2166 ("The design of the Fourteenth Amendment has proved significant also in maintaining the traditional separation of powers between Congress and the Judiciary."). As the opinion makes clear, however, the separation of powers principle implicit in Section 5 to which the Court referred means only that when the scope of Congress's legislative authority is confined to enforcing constitutional rights, Congress can only remedy or prevent state conduct that would cross the constitutional boundaries set by this Court. *Id.* at 2166-2168. In other words, the separation of powers requires that the predicative risk of a constitutional violation by the States must be identified by reference to this Court's articulation of the scope of that right. *Ibid.*; see also *id.* at 2171-2172 (explaining that RFRA exceeds Congress's Section 5 power because the remedy it imposes is out of proportion to the risk of actual constitutional violations under *Smith*).

When considered in context, *Flores*' abbreviated discussion of the separation of powers has nothing to do with RFRA's applicability to federal law or to the federal government. Nothing in *Flores* purported to address or limit Congress's legislative powers under Article I. Congress's Article I powers, moreover, are not simply remedial and preventive; they are broad and substantive. Nor is Congress's legislative authority under Article I dependent upon this Court's predicate findings about the scope of the Bill of Rights. As long as Article I legislation adheres to the constitutional floor established by this Court (and

there can be no serious argument that RFRA offers less protection than *Smith*) and does not transgress other constitutional limitations (such as the Establishment Clause, discussed pp. 18-23, *infra*, or the Due Process Clause), the separation of powers is not implicated. See *INS* v. *Chadha*, 462 U.S. 919, 941 (1983) ("Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, * * * so long as the exercise of that authority does not offend some other constitutional restriction.").

In fact, if the *Flores* Court had, as petitioner suggests, indirectly and unnecessarily reached out to decide the constitutionality of RFRA as applied to federal law, that action would have violated established principles of constitutional adjudication, which themselves embody important and fundamental separation of powers values. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 217 (1995) (where more than one argument is presented, the Court must decide the question of Congress's power to enact legislation on the narrowest possible ground); *Beazer*, 440 U.S. at 582 n.22 (Court must not decide constitutional questions "in advance of the necessity of deciding them" or "in broader terms than are required by the precise facts to which the ruling is to be applied"); *Ashwander*, 297 U.S. at 345 (Brandeis, J., concurring) (because of "the 'great gravity and delicacy' of its function in passing upon the validity of an act of Congress," the Court has established a number of principles limiting the circumstances and manner in which such review will be undertaken). This Court did no such thing.

3. The decision of the court of appeals is correct and consistent with this Court's separation of powers and Establishment Clause precedents.

a. The court of appeals correctly concluded that, in the present context, RFRA is a proper exercise of Congress's Article I powers under the Bankruptcy and Necessary and Proper Clauses. Congressional power under the Bankruptcy Clause[9] is "plenary and exclusive." *United States* v. *Kras*, 409 U.S. 434, 447 (1973). Congress may "embrace within its legislation whatever may be deemed important to a complete and effective bankrupt[cy] system." *United States* v. *Fox*, 95 U.S. 670, 672 (1877). The bankruptcy power:

> extends to all cases where the law causes to be distributed, the property of the debtor among his creditors; this is its least limit. Its greatest, is the discharge of a debtor from his contracts. And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject—distribution and discharge—are in the competency and discretion of Congress.

Hanover Nat'l Bank v. *Moyses*, 186 U.S. 181, 186 (1902).

The bankruptcy power is augmented by the Necessary and Proper Clause.[10] That Clause vests Congress with the authority to adopt "all means which are appropriate" and are "calculated to effect any of the objects entrusted to the [federal] government"

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[9] The Bankruptcy Clause vests Congress with power to "establish * * * uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const., Art. I, § 8, Cl. 4.

[10] The Necessary and Proper Clause provides that Congress may "make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers [under Article I, section 8], and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const., Art. I, § 8, Cl. 18.

through its enumerated powers. *M'Culloch* v. *Maryland* 17 U.S. (4 Wheat.) 316, 421, 423 (1819). Congress thus may "exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government." *Id.* at 420.[11]

Congress's plenary authority under the Bankruptcy and the Necessary and Proper Clauses includes the power to determine that the bankruptcy system shall be operated in a manner that is consistent with congressional policy choices. Just as it has accorded special protections to debtors' medical and educational needs, Congress has the power under the Bankruptcy Clause to mandate that the trustee, in marshaling and liquidating the debtor's assets, act in a manner that does not substantially burden the debtor's religious exercise, unless doing so would be narrowly tailored to advance a compelling federal interest.

Congress's use here of an Article I power to protect religious liberty is by no means unique. In conjunction with its power to "lay and collect Taxes," U.S. Const., Art. I, § 8, Cl. 1, Congress has chosen to provide tax-exempt status to religious organizations.

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[11] Petitioner argues (Pet. 12) that, even if RFRA falls within an enumerated power under Article I, Section 8, the statute must separately satisfy the three-part test commonly applied under the Necessary and Proper Clause in order to pass constitutional muster. The Necessary and Proper Clause, however, serves "to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted." *M'Culloch*, 17 U.S. at 420. RFRA, moreover, clearly passes that test because the protection of religious freedom is a legitimate legislative end; RFRA does not violate any other constitutional provision; and it is an appropriate and reasonable method of achieving Congress's legislative goal. *Id.* at 421.

See 26 U.S.C. 501(c)(3) (Supp. II 1996); *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 585-592 (1983). In addition, Congress has enacted legislation exempting from the Social Security tax self-employed members of religious sects who are religiously opposed to accepting governmental benefits, 26 U.S.C. 1402(g), even though this Court has held that the Free Exercise Clause does not require such accommodation, *United States* v. *Lee*, 455 U.S. 252 (1982).

Congress has also used its war powers and its commerce power to enact legislation requiring the accommodation of religious exercise. See, *e.g.*, 10 U.S.C. 774 (permitting military service members to wear religious apparel while in uniform under certain circumstances); 42 U.S.C. 2000e(j) (Commerce Clause legislation requiring private employers reasonably to accommodate employees' religious exercise).

b. Petitioner errs in contending (Pet. 12-15) that RFRA cannot be proper Article I legislation because it affords more protection for religious liberty than the Constitution requires and thus violates the separation of powers. Legislative enactments that, like RFRA, respond to decisions of this Court by creating enhanced statutory rights are commonplace and wholly consistent with the separation of powers doctrine. In *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980), for example, a plurality of the Court held that a voting practice's discriminatory effect, standing alone, does not violate the Equal Protection Clause. *Id.* at 65-80 (opinion of Stewart, J.). In response to *Bolden*'s delineation of the scope of the Equal Protection Clause, Congress amended the Voting Rights Act, Pub. L. No. 97-205, 96 Stat. 131, to "make clear that a violation could be proved by showing discriminatory effect alone" and expressly reestablished as a

matter of statutory law the legal standard employed by this Court in earlier equal protection cases, such as *White* v. *Regester*, 412 U.S. 755 (1973). See *Thornburg* v. *Gingles*, 478 U.S. 30, 35 (1986); see also *Reno* v. *Bossier Parish Sch. Bd.*, 117 S. Ct. 1491, 1499-1500 (1997). Acknowledging that Congress's action "was largely a response to this Court's plurality opinion in [*Bolden*]," the Court has enforced that statutory right for nearly 15 years without voicing any separation of powers concerns. *Gingles*, 478 U.S. at 35; see also *Mississippi Republican Executive Comm.* v. *Brooks*, 469 U.S. 1002 (1984) (mem.).

Likewise, in *Washington* v. *Davis*, 456 U.S. 229 (1976), this Court held that only intentional discrimination in public employment violates the Equal Protection Clause. *Id.* at 238-248. Congress has nevertheless imposed upon governmental employers, through Title VII, the discriminatory impact test that this Court rejected as a constitutional matter in *Davis*. See *Connecticut* v. *Teal*, 457 U.S. 440, 445-456 (1982); see also *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 452-456 & n.9 (1976).[12]

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[12] See also *City of Rome* v. *United States*, 446 U.S. 156, 173-178 (1980) (upholding statutory prohibition on voting practices with discriminatory effects and requirement of heightened scrutiny through preclearance process, despite ruling that same day that only intentional discrimination violates Fifteenth Amendment); Pregnancy Discrimination Act, 42 U.S.C. 2000e(k) (legislative response to *Geduldig* v. *Aiello*, 417 U.S. 484 (1974)); 10 U.S.C. 774 (in response to *Goldman* v. *Weinberger*, 475 U.S. 503 (1986), legislation increasing protection for religious objections to military uniform restrictions); *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 18 n.8 (1989) (noting that Congress could enact legislation giving members of the military broad rights to wear religious head coverings in response to *Goldman*); 42 U.S.C. 2000aa (1994 & Supp. II 1996) (in response

Petitioner's separation of powers argument proceeds from the mistaken assumption that, in *Smith*, this Court articulated not just a constitutional floor on how little, but also a ceiling on how much, government can accommodate religion. Quite the opposite, *Smith* expressly anticipated a legislative response to its decision:

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.

494 U.S. at 890. *Flores* and *Smith* thus unquestionably permit States to protect religious liberty more than the Constitution requires, whether through retaining the *Sherbert*/RFRA standard in their own constitutions or through separate legislation. It would be illogical to conclude that Congress cannot do the same within its own sphere. See *Flores*, 117 S. Ct. at 2171 ("When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution.").

c. Contrary to petitioner's contention (Pet. 18-26), RFRA fully comports with the Establishment

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to *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978), legislation immunizing the press from certain searches).

Clause. "The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz* v. *Tax Comm'n*, 397 U.S. 664, 673 (1970). Rather, government may "respect[] the religious nature of our people and accommodate[] the public service to their spiritual needs." *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952). Whatever the outer limits of permissible accommodation, this Court's precedents demonstrate that the lifting of substantial, governmentally imposed burdens on religion in a sectarian-neutral manner does not run afoul of the Establishment Clause. Petitioner's argument, by contrast, would require the invalidation of every state constitution and law that, like RFRA, imposes heightened protection for the exercise of religion beyond the *Smith* floor, without providing equivalent protection for non-religious beliefs.[13]

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[13] Numerous States employ essentially the same test as RFRA to protect religious exercise under their own constitutions and laws. See R.I. Gen. Laws § 42-80.1-3(b) (1993); *State* v. *Miller*, 549 N.W.2d 235, 241 (Wis. 1996); *Swanner* v. *Anchorage Equal Rights Comm'n*, 874 P.2d 274, 280-281 (Alaska), cert. denied, 513 U.S. 979 (1994); *Attorney General* v. *Desilets*, 636 N.E.2d 233, 235-236 (Mass. 1994); *Hunt* v. *Hunt*, 648 A.2d 843, 853-854 (Vt. 1994); *In re Dubreuil*, 629 So. 2d 819, 822 (Fla. 1993); *First Covenant Church* v. *City of Seattle*, 840 P.2d 174, 185-187 (Wash. 1992); *Rupert* v. *City of Portland*, 605 A.2d 63, 65-66 (Me. 1992) (applying compelling interest test to analyze claim under state constitution); *St. John's Lutheran Church* v. *State Compensation Ins. Fund*, 830 P.2d 1271, 1277 (Mont. 1992) (applying compelling interest test without discussing *Smith*); *State* v. *Hershberger*, 462 N.W.2d 393, 396-398 (Minn. 1990); *State* v. *Evans*, 796 P.2d 178, 179-180 (Kan. Ct. App. 1990) (applying compelling interest test without discussing *Smith*); *In re Brown*, 478 So. 2d 1033, 1039 & n.5 (Miss. 1985);

RFRA has a secular legislative purpose. The alleviation of significant governmental interference with religious exercise is a permissible secular purpose, as long as Congress does not "abandon[] neutrality and act[] with the intent of promoting a particular point of view in religious matters." *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. 327, 335 (1987). Congress's purpose in enacting RFRA was to advance uniformly the civil rights of all religious adherents; Congress played no favorites. Cf. *Board of Educ. of Kiryas Joel Village Sch. Dist.* v. *Grumet*, 512 U.S. 687, 702-707 (1994). Furthermore, by limiting RFRA to instances in which federal laws "substantially burden" religious exercise, 42 U.S.C. 2000bb-1, Congress acted only "to alleviate significant governmental interference" with religious autonomy and exercise. *Amos*, 483 U.S. at 335; cf. *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 15 (1989) (opinion of Brennan, J.). Under those circumstances, the Establishment Clause does not "require that the exemption come packaged with benefits to secular entities." *Amos*, 483 U.S. at 338. In any event, as we have noted (see pp. 2-3, *supra*), the 1998 Donation Act, which now controls this case, applies to transfers to all qualified recipient religious or charitable entities.

RFRA also has a permissible primary effect. "A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under

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Porth v. *Roman Catholic Diocese*, 532 N.W.2d 195, 199 (Mich. Ct. App. 1995); cf. *State ex rel. Swann* v. *Pack*, 527 S.W.2d 99, 111 (Tenn. 1975) (state constitutional protection of religion is "substantially stronger" than federal constitutional protection), cert. denied, 424 U.S. 954 (1976).

Lemon [v. *Kurtzman*, 403 U.S. 602 (1971)], it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337. Thus, exemptions from generally applicable statutes often do not constitute impermissible governmental facilitation of religion, because the government neither adds to nor subsidizes the propagation of the religious message. *Ibid.*

As in *Amos*, nothing in RFRA results in the direct advancement or subsidization of religion. RFRA requires only that, under specified circumstances, the federal government must leave religion to operate in its own sphere by exempting persons from generally applicable obligations that substantially burden their religious exercise. See *Kiryas Joel*, 512 U.S. at 706 (permissible accommodations "have allowed religious communities and institutions to pursue their own interests free from governmental interference"). Under RFRA, religious practitioners will not be any better off than before coming into contact with the federal government; they will simply be less worse off because of the interaction.

Finally, RFRA does not impermissibly entangle the religious and the secular. Religious exemptions, as a whole, decrease governmental involvement with religion. *Amos*, 483 U.S. at 339. Like the provision of Title VII at issue in *Amos*, RFRA "effectuates a more complete separation of" government and religious practitioners and avoids the "intrusive inquiry" into religious doctrine and practices entailed by

efforts to regulate religious conduct. *Amos*, 483 U.S. at 339.[14]

Petitioner errs in her contention (Pet. 22-23) that RFRA fosters excessive entanglement by mandating an inquiry into whether government action imposes a substantial burden upon an individual's exercise of religion. Courts clearly possess the institutional competence and constitutional ability to administer RFRA's test. Even apart from RFRA, the substantial burden/compelling interest test continues to govern hybrid constitutional claims and First Amendment cases where government either intentionally targets religion or provides for individualized consideration of claims in its statutory scheme. See *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993); *Smith*, 494 U.S. at 881-885. Courts also must inquire into the existence of a substantial or "significant" burden on religious exercise when deciding whether religious accommodations comport with the Establishment Clause. *E.g.*, *Texas Monthly*, 489 U.S. at 15 (opinion of Brennan, J.). In addition, such inquiries are commonplace under state constitutions and statutes that offer more

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[14] In the bankruptcy context, for example, exempting tithes from the trustee's avoidance powers prevents churches from becoming routinely entangled in bankruptcy proceedings. Without such an exemption, churches that receive tithes will face demands for return of such contributions, become parties to litigation, face discovery of church records, and be forced to undergo evaluation of church assets for the collection of judgments. In addition, in many cases the courts may have to evaluate church doctrine and practices to determine if a contribution was made "in exchange for" services within the meaning of the Bankruptcy Code. See Pet. App. A88-A89 (discussing such a case). RFRA avoids those entanglements.

protection for religious liberty than *Smith*. See note 13, *supra*.[15]

4. Petitioner also seeks this Court's review of the merits of the court of appeals' interpretation and application of RFRA's terms. Pet. 27-30. The United States has intervened in this litigation solely to defend the constitutionality of RFRA. We thus do not address that argument other than noting, again, that the Donation Act renders those issues of no enduring relevance to the parties or to similarly situated litigants.

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[15] Petitioner also contends (Pet. 24-25) that RFRA violates the Establishment Clause as applied in this case. That claim does not merit review. First, there is no circuit conflict on that question. Second, the Donation Act both ensures that no conflict will arise and disposes of petitioner's arguments by requiring that non-religious, charitable donations also be exempted from avoidance. Third, if granting the particular relief requested would violate the Establishment Clause, that would constitute a compelling interest justifying the trustee's refusal to accommodate. See *Widmar* v. *Vincent*, 454 U.S. 263, 271 (1981). Thus, RFRA by its own terms does not authorize any relief that is constitutionally proscribed, and petitioner's argument—even if correct—would render RFRA inapplicable, rather than unconstitutional.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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